Guideline Sentencing Update

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Departures

Substantial Assistance

Fourth Circuit holds that departure may be warranted where district court prohibited defendant from actively cooperating with the government in order to obtain substantial assistance departure. Defendant was arrested for possession of child pornography materials. He soon entered a plea agreement that, among other things, called for him to cooperate with an investigation of criminal activity by others in exchange for a downward departure for substantial assistance under USSG §5K1.1. However, after defendant entered his plea, as a condition of release "the district court ordered Goossens to cease his active cooperation in investigative operations. The result of this prohibition was that Goossens was unable to assist the Government personally or to participate in an operation planned by the United States Customs Service. The parties subsequently requested that the district court allow Goossens to resume his active cooperation with law enforcement officials." The district court refused to lift the ban, and the government subsequently did not file a §5K1.1 motion. Defendant requested a downward departure on the ground that the Sentencing Commission did not consider a situation where a district court order prevented a defendant from assisting the government to qualify for a §5K1.1 departure. The district court denied that request, but sua sponte departed downward under §5K2.13 for diminished capacity. The government appealed that departure.

The appellate court remanded. First, it held that the facts did not support a finding that defendant suffered from diminished mental capacity such as would justify departure under §5K2.13. Because the sentence would have to be reconsidered on remand, the court "address[ed] the prohibition on Goossens' active cooperation with law enforcement authorities and the appropriateness of departing downward from the properly calculated guideline range on the basis of this prohibition."

"The district court committed a clear abuse of discretion by imposing the prohibition on cooperation with law enforcement officials as a condition of Goossens' release. Although we have difficulty imagining factual circumstances in which the imposition of such a condition might be appropriate, we do not foreclose the possibility that such a condition might in some extraordinary circumstances properly be imposed by a district court when truly necessary to assure a defendant's appearance or to protect the public safety. There is no genuine argument, however, that the condition was necessary in this instance. Indeed, the district court did not even attempt to justify its imposition on this basis. Instead, the court based its decision on its view of what would best benefit the rehabilitation of the defendant, a factor that is conspicuously absent among those specified in [18 U.S.C.] §3142(c)(1)(B)," the provision that prescribes conditions of release that may be imposed on a convicted defendant.

"Furthermore, in so doing, the district court improperly frustrated Goossens' desire to cooperate in order to qualify for more favorable sentencing treatment and the Government's legitimate hope that he would aid in law enforcement authorities' investigative efforts. *See U.S. v. Vargas*, 925 F.2d 1260, 1265 (10th Cir. 1991) (holding that 'inflexible practice' by district court of refusing to permit criminal defendants to cooperate was error); *U.S. v. French*, 900 F.2d 1300, 1302 (8th Cir. 1990) (same)."

The court concluded that "the Sentencing Commission did not consider the possibility that a district court might affirmatively prohibit a defendant from cooperating with law enforcement authorities in an effort to qualify for a departure based upon substantial assistance. And, it is undisputed that Goossens was so prohibited by the district court in this instance. Accordingly, we conclude that on remand the district court should determine whether, under the circumstances of this case, this factor is sufficiently important such that a sentence outside the guideline range should result. In weighing whether the facts presented by situations such as this warrant a sentence outside the guideline range, a court should consider whether a defendant's cooperation likely would have been such that the Government would have moved for a departure based upon substantial assistance had the defendant's cooperation not been foreclosed improperly."

U.S. v. Goossens, 84 F.3d 697, 699–704 (4th Cir. 1996).

See *Outline* generally at VI.F.1.a.

Mitigating Circumstances

First Circuit holds that "aberrant behavior" is determined by viewing the totality of the circumstances. Defendant pled guilty to one count of mail fraud. He requested departure based on "aberrant behavior," and the government agreed. The district court, however, ruled that it could not depart on this basis because defendant's conduct did not fall within the court's definition of aberrant behavior, which included "spontaneity or thoughtlessness in committing the crime of conviction."

The appellate court remanded. Rejecting the approach of some circuits that require "a spontaneous and seemingly thoughtless act," the court opted for the broader view of aberrant behavior taken by the Ninth and Tenth Circuits. It held that "determinations about whether an offense constitutes a single act of aberrant behavior should be made by reviewing the totality of the circumstances. District court judges may consider, inter alia, factors such as pecuniary gain to the defendant, charitable activities, prior good deeds, and efforts to mitigate the effects of the crime in deciding whether a defendant's conduct is aberrant in terms of other crimes. . . . Spontaneity and thoughtlessness may also be among the factors considered, though they are not prerequisites for departure."

"That aberrant behavior departures are available to first offenders whose course of criminal conduct involves more than one criminal act is implicit in our holding. . . . We think the Commission intended the word 'single' to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to 'single acts of aberrant behavior' to include multiple acts leading up to the commission of a crime. . . . Any other reading would produce an absurd result. District courts would be reduced to counting the number of acts involved in the commission of a crime to determine whether departure is warranted. Moreover, the practical effect of such an interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts."

The court added that, "[w]ithout more, first-offender status is not enough to warrant downward departure. District courts are not, however, precluded from considering first-offender status as a factor in the departure calculus. Departure-phase consideration of a defendant's criminal record does not, we think, wrongly duplicate the calculations involved in establishing a defendant's criminal history category under the Guidelines. . . . The Guidelines explain that 'the court may depart . . . even though the reason for departure is taken into consideration . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.' U.S.S.G. §5K2.0."

U.S. v. Grandmaison, 77 F.3d 555, 562–64 (1st Cir. 1996). *But see U.S. v. Withrow*, 85 F.3d 527, 531 (11th Cir. 1996) (aberrant behavior "is not established unless the defendant is a first-time offender and the crime was a spontaneous and thoughtless act rather than one which was the result of substantial planning"); *U.S. v. Dyce*, 78 F.3d 610, 619 (D.C. Cir. 1996) (following circuits that require "a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning"), *as amended on denial of rehearing*, 91 F.3d 1462, 1470 (D.C. Cir. 1996).

See *Outline* at VI.C.5.c.

Seventh Circuit holds that "sentencing manipulation" is not a valid defense. Over a three-week period defendant made four separate sales of heroin to an undercover agent, the last one being the largest at one kilogram. Defendant claimed on appeal that the government manipulated his sentence by waiting to arrest him so that the additional heroin sold would increase his sentence.

The appellate court rejected this claim. "Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence. . . . This claim is distinct from a claim of sentencing entrapment which occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense" (a claim defendant did not make). "We now hold that there is no defense of sentencing manipulation in this circuit. A suspect has no constitutional right to be arrested when the police have probable cause. . . . It is within the discretion of the police to decide whether delaying the arrest of the suspect will help ensnare co-conspirators, as exemplified by this case, will give the police greater understanding of the nature of the criminal enterprise, or merely will allow the suspect enough 'rope to hang himself.' Because the Constitution requires the government to prove a suspect is guilty of a crime beyond a reasonable doubt, the government 'must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.'"

U.S. v. Garcia, 79 F.3d 74, 75–76 (7th Cir. 1996).

See *Outline* at VI.C.4.c.

Tenth Circuit holds that claim of sentencing entrapment or manipulation will be reviewed under outrageous conduct standard. Defendant was suspected of cocaine distribution. After the government made three half-kilogram purchases from a coconspirator by an undercover operative, they arranged a larger purchase that resulted in the seizure of five kilograms of cocaine that defendant and another were transporting, plus five more kilograms from a farm where government agents had suspected defendant stored drugs. Defendant was sentenced on the basis of all 11.5 kilograms of cocaine but argued that the last ten kilograms should have been excluded because the government engaged in "sentence factor manipulation" by continuing its investigation and negotiating the multikilogram purchase after it had sufficient evidence against defendant and his coconspirators.

The appellate court disagreed and affirmed the sentence. "This Circuit never has addressed squarely a defense claim of 'sentencing factor manipulation' under that rubric. However, we have addressed the same concept under the appellation of 'outrageous governmental conduct' . . . [and] suggested that sufficiently egregious government conduct may affect the sentencing determination. . . . [W]e believe that arguments such as Lacey's,

whether presented as 'sentencing factor manipulation' or otherwise, should be analyzed under our established outrageous conduct standard. . . . [T]he relevant inquiry is whether, considering the totality of the circumstances in any given case, the government's conduct is so shocking, outrageous and intolerable that it offends 'the universal sense of justice.'" Looking at the circumstances of the case, the court concluded that the multikilogram transaction "was in furtherance of legitimate law enforcement objectives and not, as a matter of law, outrageous."

U.S. v. Lacey, 86 F.3d 956, 963–66 (10th Cir. 1996).

See *Outline* at VI.C.4.c.

Determining the Sentence

"Safety Valve" Provision

First Circuit holds that submitting to debriefing by government is advisable, but not required, under safety valve provision. Defendant requested application of 18 U.S.C. §3553(f) on the basis of "an eight-page letter setting forth what purported to be Montanez' 'information' concerning the crimes charged in the case" that his attorney sent to the government. However, the letter "was drawn almost verbatim from an affidavit filed by one of the federal agents early in the case." In finding that defendant had not satisfied §3553(f)(5)'s requirement to "truthfully provide to the Government all information" about the offense, the district court indicated that defendants must submit to debriefing by the government to qualify for the safety valve provision. On appeal, defendant argued that there is no debriefing requirement and that the letter complied with the statute. The government argued that debriefing is required but, alternatively, that defendant had not made the required disclosures anyway.

"[T]he issue before us is whether the statute requires the defendant to offer himself for debriefing as an automatic pre-condition in every case, and it is hard to locate such a requirement in the statute. All that Congress said is that the defendant be found by the time of the sentencing to have 'truthfully provided to the Government' all the information and evidence that he has. Nothing in the statute, nor in any legislative history drawn to our attention, specifies the form or place or manner of the disclosure." Although debriefing is not required, "[a]s a practical matter, a defendant who declines to offer himself for a debriefing takes a very dangerous course. It is up to the defendant to persuade the district court that he has 'truthfully provided' the required information and evidence to the government. . . . And a defendant who contents himself with a letter runs an obvious and profound risk: The government is perfectly free to point out the suspicious omissions at sentencing, and the district court is entitled to make a common sense judgment, just as the district judge did in this case. . . . The possibility remains, however rare, that a defendant could make a disclosure without a debriefing (*e.g.*, by letter to the prosecutor) so truthful and so complete that no prosecutor could fairly suggest any gap or omission." This was not such a case, however, and the court concluded that "[t]he failure to disclose is so patent in this case that no reason exists for extended discussion."

U.S. v. Montanez, 82 F.3d 520, 522–23 (1st Cir. 1996). *See also U.S. v. Jimenez Martinez*, 83 F.3d 488, 495–96 (1st Cir. 1996) (agreeing with *U.S. v. Rodriguez*, 60 F.3d 193 (5th Cir. 1995) [8 *GSU* #1], that statements to probation officer do not satisfy requirement of §3553(f)(5) to provide information "to the Government").

See *Outline* at V.F and cases in 8 *GSU* #'s 1,5, and 6.

Criminal History

Career Offender Provision

Eighth Circuit holds that amended definition of "Offense Statutory Maximum" conflicts with statute. Effective Nov. 1, 1994, Amendment 506 states that "Offense Statutory Maximum," used to determine a career offender's offense level, "refers to the maximum term of imprisonment authorized for the offense of conviction . . . not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." *See* USSG §4B1.1, comment. (n.2). Defendant was subject to such an enhancement, but the district court followed the amendment and used the unenhanced statutory maximum. The government appealed, claiming that the Sentencing Commission exceeded its authority in enacting the amendment.

The appellate court agreed and remanded. "Based upon the plain language of [28 U.S.C. §]994(h), we conclude that the amendment conflicts with the statute and is therefore invalid. . . . Section 994(h) requires that '[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older' and has been convicted of a crime of violence or enumerated drug offense and has at least two prior such convictions. . . . The controverted language is the phrase 'at or near the maximum term authorized.' The question becomes the maximum term of what—the enhanced sentence or the unenhanced sentence? . . . In our view, the statute is a recidivist statute clearly aimed at the category of adult repeat violent felons and adult repeat drug felons. . . . Because the 'maximum term authorized' for categories of recidivist defendants is necessarily the enhanced statutory maximum, there is no ambiguity in the statute."

U.S. v. Fountain, 83 F.3d 946, 950–53 (8th Cir. 1996). *Accord U.S. v. Hernandez*, 79 F.3d 584, 595–601 (7th Cir. 1996) [8 *GSU* #6]; *U.S. v. Novey*, 78 F.3d 1483, 1487–91 (10th Cir. 1996) [8 *GSU* #6]. *Contra U.S. v. Dunn*, 80 F.3d 402, 404–

05 (9th Cir. 1996) [8 *GSU* #6]; *U.S. v. LaBonte*, 70 F.3d 1396, 1403–12 (1st Cir. 1995) [8 *GSU* #4], *cert. granted*, 116 S. Ct. 2545 (U.S. June 24, 1996).

See *Outline* at IV.B.3.

Sentencing Procedure

Fed. R. Crim. P. 35(a) and (c)

Second Circuit holds that complete failure to consider supervised release revocation policy statement was "clear error" allowing correction of sentence under Rule 35(c). Before defendant's supervised release was revoked, he was held for eight months in pretrial detention on a related state charge. The district court sentenced him to six months in prison without considering USSG §7B1.3(e), which states that a revocation sentence should be increased "by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. §3585(b)." Within seven days after sentencing, the court was informed that the Bureau of Prisons intended to credit defendant for the eight months in state custody, which would lead to his immediate release, and that the court had overlooked §7B1.3(e). On the seventh day the court held another sentencing hearing and resentenced defendant to fourteen months. The court reasoned that its failure to consider §7B1.3(e) was error and that it had the authority under Fed. R. Crim. P. 35(c) to "correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."

The appellate court affirmed the resentencing. "A district court's concededly narrow authority to correct a sentence imposed as a result of 'clear error' is limited to 'cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a),' . . . which authorizes the correction of a sentence on remand when the original sentence results from 'an incorrect application of the sentencing guidelines.'" Although the policy statements on revocation of release are advisory rather than mandatory, "district courts are required to consider them when sentencing a defendant for a violation of probation or supervised release. . . . Because courts are required to consider the policy statements in Chapter 7 of the Guidelines, we find that the district court's failure to do so here constituted an 'incorrect application of the sentencing guidelines' within the meaning of Rule 35(a). Accordingly, it properly exercised its authority to correct its error within seven days after the imposition of the original sentence, pursuant to Rule 35(c)."

The court distinguished *U.S. v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995) [8 *GSU* #2], where it reversed a district court attempt to use Rule 35(c) to give defendant a downward departure on resentencing. In that case, "the court's resentencing 'represented nothing more than a district court's change of heart as to the appropriateness of the sentence,'" which is not authorized by the rule.

U.S. v. Waters, 84 F.3d 86, 89–90 (2d Cir. 1996).

See *Outline* at IX.F.

Certiorari Granted:

U.S. v. LaBonte, 70 F.3d 1396 (1st Cir. 1995) [8 *GSU* #4], *cert. granted*, 116 S. Ct. 2545 (U.S. June 24, 1996). Question presented: "Does Sentencing Commission's implementation of Career Offender Guideline [Offense Statutory Maximum] conflict with commission's obligation under Section 994(h) to 'assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of' career offenders?"

See *Outline* at IV.B.3 and summary of *Fountain* above.

Note to readers

The next revision of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* will be completed in November for distribution in December.

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